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No. 03-1328

IN THE

Supreme Court of the United States

JEANNE WOODFORD, Warden,

Petitioner,

vs.

KEVIN COOPER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a three-judge panel of the Court of Appeals has decided a motion to authorize a successive habeas petition under 28 U. S. C. § 2244(b)(3), does the Court of Appeals have authority to reconsider that decision en banc?

IN THE

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JEANNE WOODFORD, Warden,

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vs.

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation* respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition for writ of certiorari in this case. Counsel for petitioners has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim

* This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an attempt to evade Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if properly implemented, will greatly reduce unnecessary delay in the enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas. Implementation of the law would advance the rights of victims and society which CJLF was formed to protect.

April, 2004

Respectfully submitted,

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TABLE OF CONTENTS

Question presented i

Motion for leave to file iii

Interest of *amicus curiae* iii

Table of authorities vi

Brief of *amicus curiae* 1

Summary of facts and case 1

Summary of argument 6

Argument 7

I

This Court has jurisdiction to review the en banc order, either by certiorari or by extraordinary writ 7

A. Certiorari 7

B. Extraordinary writs 10

II

The doubtful legitimacy of the power exercised in this case and the apparent evasion of the will of Congress make this an important issue which should be decided by this Court 11

III

The power to rehear en banc is granted by Congress and has been withdrawn by Congress 13

A. § 46(c) and § 2244(b)(3)(B) 13

B. Successive petitions and AEDPA 16

Conclusion 20

TABLE OF AUTHORITIES

Cases

Arizona v. Evans, 514 U. S. 1, 131 L. Ed. 2d 34,
115 S. Ct. 1185 (1995) 12

Carlisle v. United States, 517 U. S. 416,
134 L. Ed. 2d 613, 116 S. Ct. 1460 (1996) 13, 18

Caspari v. Bohlen, 510 U. S. 383, 127 L. Ed. 2d 236,
114 S. Ct. 948 (1994) 2

Castro v. United States, 540 U. S. __, 157 L. Ed. 2d 778,
124 S. Ct. 786 (2003) 9

Coleman v. Thompson, 798 F. Supp. 1209
(W. D. Va. 1992) 4

Cooper v. Calderon, 255 F. 3d 1104 (CA9 2001) 2

Cooper v. Calderon, 274 F. 3d 1270 (CA9 2001) 2, 3

Cooper v. Calderon, 308 F. 3d 1020 (CA9 2002) 3

Cooper v. Calderon, 537 U. S. 861, 154 L. Ed. 2d 100,
123 S. Ct. 238 (2002) 2

Cooper v. Calderon, 2003 U. S. App. LEXIS 27035
(CA9, Feb. 18, 2003) 5

Cooper v. California, 502 U. S. 1016, 116 L. Ed. 2d 755,
112 S. Ct. 664 (1991) 2

Cooper v. Woodford, 357 F. 3d 1019 (CA9 2004) 5, 6

Cooper v. Woodford, 358 F. 3d 1117 (CA9 2004) 4, 6

De Beers Consol. Mines, Ltd. v. United States,
325 U. S. 212, 89 L. Ed. 1566,
65 S. Ct. 1130 (1945) 10, 11

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U. S. 568, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988) 10

Felker v. Turpin, 518 U. S. 651, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996) 8, 10, 18

Gomez v. United States District Court, 1992 U. S. App. LEXIS 7931 (CA9, Apr. 20, 1992) 19

Gomez v. United States District Court, 503 U. S. 653, 118 L. Ed. 2d 293, 112 S. Ct. 1652 (1992) 17

Harris v. Vasquez, 949 F. 2d 1497 (CA9 1991) 16

Harris v. Vasquez, 961 F. 3d 1450 (CA9 1992) 19

In re Byrd, 269 F. 3d 585 (CA6 2001) 13

In re Vial, 115 F. 3d 1192 (CA4 1997) 12

Lindh v. Murphy, 521 U. S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997) 15

McCleskey v. Zant, 499 U. S. 467, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) 16

Missouri v. Jenkins, 495 U. S. 33, 109 L. Ed. 2d 31, 110 S. Ct. 1651 (1990) 18

O'Dell v. Netherland, 95 F. 3d 1214 (CA4 1996) 4

People v. Cooper, 53 Cal. 3d 771, 281 Cal. Rptr. 90, 809 P. 2d 865 (1991) 1, 2

Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) 12

Ruhrgas AG v. Marathon Oil Co., 526 U. S. 574, 143 L. Ed. 2d 760, 119 S. Ct. 1563 (1999) 8

Steel Co. v. Citizens for Better Environment, 523 U. S. 83, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998) 12

Stewart v. Martinez-Villareal, 523 U. S. 637, 140 L. Ed. 2d 849, 118 S. Ct. 1618 (1998) 9

Stone v. INS, 514 U. S. 386, 131 L. Ed. 2d 465, 115 S. Ct. 1537 (1995) 16

Textile Mills Securities Corp. v. Commissioner, 314 U. S. 326, 86 L. Ed. 249, 62 S. Ct. 272 (1941) 14

United States v. American-Foreign S. S. Corp., 363 U. S. 685, 4 L. Ed. 2d 1491, 80 S. Ct. 1336 (1960) 15

United States v. Ruiz, 536 U. S. 622, 153 L. Ed. 2d 586, 122 S. Ct. 2450 (2002) 9

Vasquez v. Harris, 503 U. S. 1000, 118 L. Ed. 2d 418, 112 S. Ct. 1713 (1992) (No. A-766) 17

Vasquez v. Harris, 503 U. S. 1000, 118 L. Ed. 2d 419, 112 S. Ct. 1713 (1992) (No. A-768) 17

Western Pacific Railroad Case, 345 U. S. 247, 97 L. Ed. 986, 73 S. Ct. 656 (1953) 14, 15

United States Statutes

28 U. S. C. § 2244(b)(1) 17

28 U. S. C. § 2244(b)(2) 17

28 U. S. C. § 2244(b)(3) 7

28 U. S. C. § 2244(b)(3)(A) 18

28 U. S. C. § 2244(b)(3)(B) 15, 18

28 U. S. C. § 2244(b)(3)(C) 18

28 U. S. C. § 2244(b)(3)(D) 3

28 U. S. C. § 2244(b)(3)(E) 3

28 U. S. C. § 2244(b)(4) 18

28 U. S. C. § 46(c) 15

Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 2

Rule of Court

Supreme Court Rule 10 12

State Statutes

Cal. Penal Code § 1405 3

Treatise

R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice (8th ed. 2002) 11

Miscellaneous

141 Cong. Rec. (1995) 17

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Committee Notes on 1998 Amendments to Fed. Rule App. Proc. 35(b), 28 U. S. C. App. 19

Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295 (1992) 17

Office of the Governor, Press Release, Governor Schwarzenegger Denies Clemency to Convicted Murderer Kevin Cooper (Jan. 30, 2004) 5

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

"This case . . . chronicles the nocturnal massacre of a mother, father, daughter, and houseguest in the sanctity of their home, and the attempted murder of the young son, the only person to survive." *People* v. *Cooper*, 53 Cal. 3d 771, 793, 809 P. 2d 865, 874-875 (1991). "The jury convicted defendant of hacking to death Douglas (Doug) and Peggy Ryen, their 10-year-old daughter, Jessica, and an 11-year-old houseguest, Christopher Hughes (Chris), inside the Ryen home near . . . a state prison in Chino [California]. Eight-year-old Joshua Ryen (Josh), although severely injured, survived. Two days before this execution of the innocent, defendant had escaped from" the prison. *Id.*, at 794, 809 P. 2d, at 875. Nor was this Cooper's first crime of brutality. In 1982, "defendant burglarized a home in Pennsylvania, assaulted a high school student who interrupted the burglary, kidnapped her, and raped her. During the incident, defendant attempted to steal one vehicle, and did steal

the rape victim's vehicle." *Id.*, at 802, 809 P. 2d, at 880. Cooper's guilt of the Pennsylvania offenses was uncontested. See *ibid.*

The California Supreme Court affirmed the conviction and death sentence on direct appeal, *id.*, at 849, 809 P. 2d, at 912, and this Court denied certiorari. *Cooper* v. *California*, 502 U. S. 1016 (1991). The judgment has been "final," see *Caspari* v. *Bohlen*, 510 U. S. 383, 390 (1994), for over *twelve years*, yet it remains unexecuted.

Cooper filed habeas corpus petitions in both the Federal District Court and the California Supreme Court. See *Cooper* v. *Calderon*, 255 F. 3d 1104, 1108 (CA9 2001) (*per curiam*). The state petition was denied on February 19, 1996, and the federal petition was denied on August 25, 1997. See *ibid.* The Court of Appeals affirmed the federal denial in an unpublished memorandum decision on December 15, 2000. See *id.*, at 1017, n. 2. On petition for rehearing, the panel replaced that decision with a published opinion July 9, 2001. See *ibid.* The Court of Appeals took another six months to deny rehearing en banc. This Court denied certiorari on October 7, 2002. *Cooper* v. *Calderon*, 537 U. S. 861 (2002).

Meanwhile, on April 30, 1998, Cooper had filed a post-AEDPA[1] petition, which the District Court dismissed as successive. See *Cooper* v. *Calderon*, 274 F. 3d 1270, 1272 (CA9 2001). The Court of Appeals "construe[d] Cooper's request for a certificate of appealability as a request for authorization to file a second or successive petition pursuant to 28 U. S. C. § 2244(b)(3)(A)." *Id.*, at 1275. The court then denied the request for not meeting the statutory requirements for a successive petition. See *ibid.* The court found it unnecessary to decide whether the lapse of over two years from denial of the state petition to the filing of the second federal petition made

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1. Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (effective Apr. 24, 1996).

the latter untimely under AEDPA's statute of limitations. See *id.*, at 1257, n. 3. Cooper petitioned for rehearing, and the panel dismissed the petition as unauthorized under 28 U. S. C. § 2244(b)(3)(E). *Cooper* v. *Calderon*, 308 F. 3d 1020, 1021 (CA9 2002). Further reconsiderations and modifications took until November 13, 2002, over four and a half years from Cooper's first filing in the District Court. The decision that Congress mandated be completed in *one* month, see 28 U. S. C. § 2244(b)(3)(D), had taken over 54 months.

Concurrently with the Ninth Circuit proceedings described above, Cooper sought DNA testing from the state courts. By statute, California makes generous provisions for DNA testing. See Cal. Penal Code § 1405. Despite serious doubt regarding whether Cooper could meet the statutory "reasonable probability" requirement, see § 1405(c)(1)(B), the People entered into an agreement for DNA testing on May 10, 2001. See San Bernardino District Attorney's Brief in Response to Clemency Petition 18 (2004) ("Clemency Response").[2] "Numerous items of evidence were shipped to the crime lab at DOJ Berkeley from *two locations*; the San Bernardino County Sheriff's Property Division and the San Diego County Superior Court Evidence Locker." *Id.*, at 19 (emphasis added). The two locations are important, as explained below.

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2. For convenience and for the information of the public, we have placed this document on our Web site at http://www.cjlf.org/deathpenalty/CooperResponse.pdf. The table of contents is a separate document at http://www.cjlf.org/deathpenalty/Coopertbl.pdf. The State's response to Cooper's successive petition application, which also refutes his claim of actual innocence, is available at http://www.cjlf.org/deathpenalty/CooperSuccOpp.pdf.

As so often happens in these cases,[3] the DNA test that Cooper claimed would prove his actual innocence instead provided powerful confirmation of his actual guilt.

> "These DNA results provided additional evidence of Cooper's guilt. Specifically the results established that Cooper was the donor of the DNA found on the following items; a bloodstain in the Ryen home near the master bedroom where the victims were attacked, two cigarette butts found in the stolen Ryen station wagon when it was recovered in Long Beach, and on a tee shirt found on the side of a road within two miles of the Ryen home. Partial DNA profiles matching that of two of the victims, Doug and Peggy Ryen were found on the same tee shirt. The DNA profiles of blood taken from the hatchet that was taken from the house where Cooper hid matched that of several of the victims including Doug, Jessica and Chris Hughes. (DOJ Crime Lab Report Sept 24, 2002 pp. 1-4, P. Ex. No. 5.)" Clemency Response 19.

The T-shirt has been the focus of most of the subsequent attention. The concurring judges in the Court of Appeals went so far as to say that "*[e]verything* comes down to the bloody t-shirt." *Cooper* v. *Woodford*, 358 F. 3d 1117, 1124 (CA9 2004) (en banc) (Silverman, J., concurring in part and dissenting in part) (emphasis added).

A portion of the T-shirt was cut out prior to trial. Clemency Response 51. The main portion has been in San Diego in the custody of the court since the trial in 1985. Law enforcement personnel have had no access to it. See *id.*, at 52. Claims regarding the chain of custody of the evidence at the San Bernardino County Sheriff's Property Division are therefore

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3. See, *e. g.*, *Coleman* v. *Thompson*, 798 F. Supp. 1209, 1213-1214 (W. D. Va. 1992), aff'd, 966 F. 2d 1441 (CA4 1992), stay denied, 504 U. S. 188 (1992) (*per curiam*), cert. denied, 504 U. S. 992 (1992); *O'Dell* v. *Netherland*, 95 F. 3d 1214, 1253 (CA4 1996), aff'd on other grounds, 521 U. S. 151 (1997).

irrelevant to the main portion of the T-shirt. This is the portion that was tested for DNA at the request of Cooper's team, not the prosecution, and was found to be a positive match to Cooper.

To believe that this blood was planted by San Bernardino law enforcement personnel, one would have to believe it was planted before trial, when forensic DNA testing was unknown, and then the planted evidence was not used at trial and was not designated for testing by anyone on the prosecution side at any time thereafter. The notion that someone would plant evidence and then not use it stretches credibility far beyond the breaking point. The state trial court rejected Cooper's claims, found he had made no showing of evidence tampering, and denied his request for further testing on July 1, 2003. Clemency Response 19-20.

Cooper also lodged the test results with the Ninth Circuit and again moved to file a successive petition. The court denied the motion. "Contrary to his predictions of exculpation, the DNA test results inculpate Cooper and support his conviction." *Cooper* v. *Calderon*, 2003 U. S. App. LEXIS 27035 (CA9, Feb. 18, 2003), reh'g denied, 2003 U. S. App. LEXIS 27036 (Apr. 7, 2003). The California Supreme Court also denied six writs of habeas corpus. See *Cooper* v. *Woodford*, 357 F. 3d 1019, 1022 (CA9 2004).

Governor Schwarzenegger also reviewed Cooper claims and denied clemency.

> "I also note that Mr. Cooper sought and obtained recent DNA testing evidence and, when that testing further proved his guilt, Mr. Cooper claimed that law enforcement authorities had tampered with the tested evidence. There are no facts which lead me to believe this claim has any merit." Office of the Governor, Press Release, Governor

Schwarzenegger Denies Clemency to Convicted Murderer Kevin Cooper (Jan. 30, 2004).[4]

Cooper then moved once again in the Ninth Circuit to file a successive petition. See 357 F. 3d, at 1020. The court noted that Cooper's claims were essentially a rehash of claims already rejected on his previous application and also rejected by the state trial court. See *id.*, at 1024-1026.

"In sum, neither singly nor in combination do these items establish Cooper's innocence, or show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. To the contrary, there was clear and compelling evidence that linked Cooper to the crime." *Id.*, at 1029.

The next day, the Ninth Circuit reconsidered the panel's decision en banc, claiming it had authority to do so *sua sponte* despite 28 U. S. C. § 2244(b)(3). See *Cooper* v. *Woodford*, 358 F. 3d 1117, 1118 (CA9 2004). The en banc court purported to grant the motion to file a successive habeas petition. See *id.*, at 1124.

SUMMARY OF ARGUMENT

The question of whether this Court has certiorari jurisdiction in this case merges with the merits. If the State's interpretation of the statute is correct, the decision shielded from certiorari review by 28 U. S. C. § 2244(b)(3)(E) is the decision of the three-judge panel under paragraph (B), not the unauthorized, illegal reconsideration of that decision en banc. Because this Court has jurisdiction to determine whether it has jurisdiction and to decide all questions included in that determination, it has jurisdiction on certiorari to decide the question presented.

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4. This press release is available on the Governor's Web site, http://www.governor.ca.gov.

Alternatively, if this Court should decide that paragraph (E) precludes review on certiorari, this is a textbook case for the extraordinary writs of prohibition or mandamus. As noted in the concurring opinions in *Felker* v. *Turpin*, review through these writs is not precluded by AEDPA. A federal court issuing an order it has no authority to issue calls for correction by one of these writs.

The doubtful legitimacy of the order issued in this case presents a question of exceptional importance that should be resolved by this Court. Nothing could be more damaging to the public's confidence in the courts and the legitimacy of their authority than lawlessness by the courts themselves. The substantial possibility that a federal court has defied an act of Congress and acted without authority raises a grave question calling for definitive resolution by this Court.

The power of a Court of Appeals to rehear cases en banc is generally granted by Congress in 28 U. S. C. § 46(c), but it has been withdrawn by Congress for this particular proceeding in 28 U. S. C. § 2244(b)(3)(B). Multiple rounds of litigation in successive petition cases is precisely what Congress intended to forbid when it created the gatekeeping mechanism.

ARGUMENT

I. This Court has jurisdiction to review the en banc order, either by certiorari or by extraordinary writ.

A. Certiorari.

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress added subdivision (b)(3) to 28 U. S. C. § 2244 as follows:

> "(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for

an order authorizing the district court to consider the application.

"(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

"(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

"(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

"(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

Paragraph (E) of this subdivision raises an issue regarding this Court's jurisdiction to entertain the present certiorari petition. This is one of those peculiar cases where the question of jurisdiction merges with the question of the merits.

Felker v. *Turpin*, 518 U. S. 651 (1996) presented a somewhat similar question regarding the same statute. One of the questions was whether paragraph (E) "constitutes an unconstitutional restriction on the jurisdiction of this Court." *Id.*, at 658. If it did, the restriction would be invalid, and the Court would have certiorari jurisdiction. The habeas petitioner further contended that AEDPA unconstitutionally suspended the writ of habeas corpus. See *id.*, at 663-664. The *Felker* Court had to resolve the merits of these questions in order to uphold the validity of the statute, although ultimately coming to the conclusion it had no certiorari jurisdiction. See *id.*, at 665. A court has jurisdiction to determine if it has jurisdiction, and it may decide issues necessary to that resolution. See, *e.g.*, *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 585-586

(1999) (noting that rulings in the course of finding no jurisdiction may have preclusive effect in subsequent litigation).

Stewart v. *Martinez-Villareal*, 523 U. S. 637 (1998) construed the statute to permit review on certiorari when the question was not whether permission should be granted or denied under §2244(b)(3), but rather whether that provision applied at all. The habeas petitioner had moved for permission to file a successive petition, but the Court of Appeals decided that the petition was not successive. See *id.*, at 641. This decision was reviewable on certiorari. *Id.*, at 642.

The present case is one step closer than *Martinez-Villareal* to paragraph (E)'s no-certiorari zone, but it is still outside the zone. The en banc court did purport to grant permission to file a successive petition, but the State does not seek review of the merits of that decision. Instead, it asks whether the en banc court has the authority to decide it, a distinct question. Cf. *Castro* v. *United States*, 540 U. S. __, 157 L. Ed. 2d 778, 786, 124 S. Ct. 786, 791 (2003).

United States v. *Ruiz*, 536 U. S. 622 (2002) involved an appeal by a defendant who had pleaded guilty and wished to appeal only the sentence. In these circumstances, 18 U. S. C. § 3742(a) sharply limits appellate jurisdiction. The defendant claimed that her sentence was imposed "in violation of law," one of the statutory bases for appellate jurisdiction.

> "Although we ultimately conclude that respondent's sentence was not 'imposed in violation of law' and therefore that § 3742(a)(1) does not authorize an appeal in a case of this kind, it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction. See *United States* v. *Mine Workers*, 330 U. S. 258, 291 (1947). In order to make that determination, it was necessary for the Ninth Circuit to address the merits. We therefore hold that appellate jurisdiction was proper." *Ruiz*, 536 U.S., at 628.

So it is in the present case. In § 2244(b)(3)(E), Congress has shielded a decision from this Court's review via certiorari,

but which decision? If the State's interpretation of the statute is correct, the shielded decision is the decision of the three-judge panel. Certainly Congress would not have insulated from this Court's review an en banc redetermination that it intended to prohibit altogether.

Paragraph (B) requires that the motion "be determined by a three-judge panel of the court of appeals," and paragraph (E) says "[t]he grant or denial . . . shall not be the subject of a petition for rehearing or for a writ of certiorari." If the State's interpretation is correct, the "grant or denial" in paragraph (E) is the "determination" from paragraph (B). The action of the en banc court is an unauthorized, illegal *re*determination, not shielded from this Court's review. The question of jurisdiction thus merges with the merits.

B. Extraordinary Writs.

In the alternative, if certiorari is not available, then this is a textbook case for the extraordinary writs, either mandamus to require the Court of Appeals to reinstate the decision of the panel or prohibition to stop any further proceedings in the District Court. *Felker* held that the removal of certiorari jurisdiction did not preclude review by an original habeas writ, on the principle that "[r]epeals by implication are not favored . . . ." 518 U. S., at 660. On the same basis, § 2244(b)(3)(E) "does not purport . . . to limit [this Court's] jurisdiction under the All Writs Act, 28 U. S. C. § 1651." *Id.*, at 666 (Stevens, J., concurring). Indeed, interpretation of the statute to preclude such review would reopen "the question whether the statute exceeded Congress's Exceptions Clause power," *id.*, at 667 (Souter, J., concurring), which by itself is a good reason not to adopt such an interpretation. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988).

De Beers Consol. Mines, Ltd. v. *United States*, 325 U. S. 212 (1945) discussed the proper use of the All Writs Act, now 28 U. S. C. § 1651(a), which was then codified as § 262 of the

Judicial Code. See *De Beers*, *supra*, at 216. "When Congress withholds interlocutory reviews, § 262 can, of course, not be availed to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of § 262." *Id.*, at 217.

If the State is correct on the merits, a matter which should be decided on full briefing and argument, then usurpation is precisely what happened here. Congress intended that after one full round of state and federal review, capital cases would proceed expeditiously to execution in all but the rarest cases. See *infra*, at 16-19. To achieve this goal, Congress vested the decision to allow another round in a three-judge panel of the Court of Appeals and prohibited review of that decision by the usual means (rehearing and certiorari), so that it would be final and no further stays would be granted in almost all cases. Subjecting the merits of the decision to scrutiny by the court en banc is the usurpation of a power which Congress has withdrawn. The State is injured by delay in executing its judgment while yet another round of litigation takes place, precisely the result Congress intended to prohibit.

The only other element needed for an extraordinary writ is the absence of any other remedy. The State believes that relief is available by certiorari under 28 U. S. C. § 1254(1). However, if the Court should decide otherwise, then all the conditions for employment of the All Writs Act are present.

II. The doubtful legitimacy of the power exercised in this case and the apparent evasion of the will of Congress make this an important issue which should be decided by this Court.

Most successful petitions for certiorari in this Court are based on a division of opinion in the federal courts of appeals and state high courts. See R. Stern, E. Gressman, S. Shapiro,

& K. Geller, Supreme Court Practice 225 (8th ed. 2002); Supreme Court Rule 10(a), (b). To date, no such conflict appears in the published opinions of the courts of appeals. However it does not appear that any circuit other than the Second, Sixth, and Ninth has reconsidered en banc the decision of a three-judge panel under 28 U. S. C. § 2244(b)(3).[5]

On a matter of lesser moment, it might be prudent to wait for other circuits to take an express stand, *i.e.*, to let the issue "percolate." See, *e.g.*, *Arizona* v. *Evans*, 514 U. S. 1, 23-24, n. 1 (1995) (Ginsburg, J., dissenting). However, Rule 10(c) recognizes that some questions of federal law are so important that they should be decided by this Court, even in the absence of conflicting decisions. This is one of those matters.

This Court has a long history of exercising scrupulous care regarding jurisdiction and insisting that other federal courts do the same. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94-95 (1998). The reason why jurisdiction is so important is that it goes to the heart of the legitimacy of judicial power. In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 865 (1992), the Court explained, albeit in a somewhat different context, why it is so important that court decisions be legitimate and be perceived as such by the people.

> "The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows

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5. *In re Vial*, 115 F. 3d 1192, 1193 (CA4 1997) considered a successive petition request by a federal defendant en banc without a prior panel decision. That decision does not discuss or appear to be aware of the requirement of § 2244(b)(3)(B).

> itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."

Nothing could be more destructive to the essential public confidence in the judiciary than lawless behavior by the courts themselves. If courts ignore or evade acts of Congress and issue orders they have no legitimate authority to issue, the public confidence that is essential to the institutional integrity of the federal judiciary will be irreparably weakened.

In the present case, the State believes, with considerable justification, that the en banc court of appeals decided an issue it had no authority to decide, issued an order it had no authority to issue, and defied an act of Congress. It did so in a capital case, further delaying punishment for a heinous crime, where the DNA testing of the central evidence has already been done and has powerfully confirmed the defendant's guilt. A well-founded charge of judicial usurpation is a grave matter, calling for resolution by this Court.

III. The power to rehear en banc is granted by Congress and has been withdrawn by Congress.

A. § 46(c) and § 2244(b)(3)(B).

The concurring judges in *In re Byrd*, 269 F. 3d 585, 592-593 (CA6 2001) (Cole, J., concurring) thought that the power of an appellate court to reconsider a panel decision en banc was "inherent." That term can refer to a power that a court has in the absence of legislation, or it can refer to a power that Congress cannot remove without violating Article III of the Constitution. See *Carlisle* v. *United States*, 517 U. S. 416, 434 (1996) (Souter, J., concurring). If used in the first sense, the "inherent" nature of the power is irrelevant, since Congress has provided for rehearing en banc generally in 28 U. S. C. § 46(c), and the only question is whether 28 U. S. C. § 2244(b)(3) removes that general authority in this specific instance. To the

extent the *Byrd* concurrence thought the power was indefeasible, it is contrary to this Court's cases.

Prior to 1941, confusing and conflicting language in various statutes had created a conflict in the courts of appeals regarding whether they had the authority to hear cases en banc. See *Textile Mills Securities Corp.* v. *Commissioner*, 314 U. S. 326, 327-331 (1941); *Western Pacific Railroad Case*, 345 U. S. 247, 253 (1953). *Textile Mills* resolved that split in favor of the authority, largely based on practical considerations. See 314 U. S., at 334-335. However, the Court noted, "Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting *en banc*. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation." *Id.*, at 335. Far from implying that Congress lacked the power to enact a contrary rule, as the *Byrd* concurrence does, *Textile Mills* implied the exact opposite.

In the 1948 revision of Title 28, Congress enacted § 46(c). "It was motivated by a dual purpose: to give express recognition to the doctrine of *Textile Mills*, while at the same time securing the tradition of three-judge courts against any further intrusion." *Western Pacific*, 345 U. S., at 254. "Because *§ 46(c) is a grant of power*, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power should be exercised." *Id.*, at 259 (emphasis added; footnote omitted). Congress granted the power, and Congress can take it away.

At this point, it is convenient to put the general and specific statutes side by side to see the similarities and differences:

28 U. S. C. § 46(c):

"Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . , *unless* a hearing or rehearing in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service . . . ." (Emphasis added).

28 U. S. C. § 2244(b)(3)(B):

"A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals."

Section 46(c) applies to "cases and controversies" while § 2244(b)(3)(B) applies to the specific proceeding at issue here. To the extent they differ, the specific controls the general. The general statute says "heard and determined," while the specific statute says only "determined." Congress did not expect that there would be oral argument on these motions. "Determined" in these statutes means "decided." See *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685, 688 (1960).

Section 46(c) provides for three-judge panels as a general rule. The language, supported by legislative history, fortifies the three-judge panel as the norm. See *Western Pacific*, 345 U. S., at 258. The "grant of power" lies in the "unless" clause. See *ibid.* In contrast, § 2244(b)(3)(B) contains substantially the same three-judge panel language but omits the "unless" clause. Instead of "determined . . . unless" it says "determined" period. "Nothing, indeed, but a different intent explains the different treatment." *Lindh* v. *Murphy*, 521 U. S. 320, 329 (1997). Nothing, indeed, but a different intent explains the existence of paragraph (B) at all. If Congress intended that determination by three-judge panels should be the norm, but that determination or redetermination en banc would be discretionary with the court, there would have been no reason to mention the subject at all. The general rule of § 46(c) already provides that. "*En banc* courts are the exception, not the rule." *American-Foreign*, 363 U. S., at 689. Absent a compelling justification, statutes

should not be construed to render language superfluous. See *Stone* v. *INS*, 514 U. S. 386, 397-398 (1995). There is no justification, compelling or otherwise, in this case. On the contrary, prohibition of rehearing en banc is fully consistent with the purpose of the statute and with the prohibition of certiorari.

B. Successive Petitions and AEDPA.

Of all the problems in capital habeas litigation prior to AEDPA, none cried out for reform more loudly than the abuse of the writ by repeated petitions, making new claims in each round. This is the area where Congress was most emphatic in its determination to curtail abusive practices. The exemplar of abuse was the Ninth Circuit's notorious mishandling of the case of Robert Alton Harris.

In *McCleskey* v. *Zant*, 499 U. S. 467 (1991), this Court tightened the restrictions on successive petitions by adopting the cause-and-prejudice/actual innocence standard from the procedural default cases, replacing the "deliberate abandonment" standard. See *id.*, at 490, 493-494. It was widely believed that this tightening of the standard would curtail the abuse of successive petitions and allow most cases to proceed to execution reasonably soon after the decision on appeal of the first federal habeas petition. Indeed, *amicus* CJLF proposed this standard to the *McCleskey* Court, see *id.*, at 523, n. 10 (Marshall, J., dissenting), in the belief that it would strike the appropriate balance. Regrettably, the *Harris* case would soon demonstrate that stronger medicine was needed.

Eleven years after his conviction and sentence for a double murder, Robert Alton Harris filed his *third* federal habeas petition. See *Harris* v. *Vasquez*, 949 F. 2d 1497, 1500 (CA9 1991). Four months after *McCleskey* a panel of the Ninth Circuit affirmed denial of habeas relief, based on *McCleskey* as well as other grounds. See *id.*, at 1501. Yet justice in this case, already long overdue, was further delayed by a blizzard of successive petitions, petitions for rehearing, stay of mandate,

certiorari, and recall of mandate, in addition to a civil rights lawsuit, all on top of state proceedings. See Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 321-326 (1992). The Ninth Circuit and its judges issued three stays, see *id.*, at 324, which were vacated by this Court in *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (No. A-766) and *Gomez* v. *United States District Court*, 503 U. S. 653 (1992) (*per curiam*). An individual circuit judge issued yet another stay after Harris was already in the gas chamber, resulting in this Court's extraordinary order that the lower federal courts would issue no further stays. See *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (No. A-768).

The outrage from this debacle reverberated across the nation. As the various habeas reform bills moved through Congress, supporters of reform repeatedly cited *Harris* as the prime example of what was wrong with the system. See 141 Cong. Rec. 4107-4108 (1995) (statement of Mr. Cunningham); *id.*, at 4111-4113 (statement of Mr. Cox); *id.*, at 9304, col. 2-3 (statement of Sen. Specter); *id.*, at 14734, col. 1 (statement of Sen. Feinstein); *id.*, at 15019, col. 2 (statement of Sen. Specter); 142 Cong. Rec. 4610, col. 1 (1996) (statement of Mr. Hyde); *id.*, at 7562, col. 3 (statement of Sen. Feinstein); *id.*, at 7798, col. 2-3 (statement of Sen. Specter); *id.*, at 9462, col. 2 (statement of Sen. Abraham).

Although other parts of the habeas reform were highly controversial, there was broad, bipartisan consensus that strong measures were needed on successive petitions. Senator Biden, the principal opponent of the "deference" standard of 28 U. S. C. § 2254(d), agreed that "strict" limits on successive petitions were in order. See 141 Cong. Rec. 15047, col. 3 (1995).

To prevent extended proceedings after the first round in most cases, while still providing a safety value for exceptional cases, Congress devised a two-step plan. Substantively, Congress tightened the criteria for successive petitions, making them far more stringent than the *McCleskey* standard. See 28

U. S. C. § 2244(b)(1), (2). Procedurally, Congress established a " 'gatekeeping' mechanism" in subdivision (b)(3). See *Felker* v. *Turpin*, 518 U. S. 651, 657 (1996).

Congress designed the gatekeeping mechanism to avoid the multiple rounds of reconsideration that made the *McCleskey* rule inadequate. Instead of the usual decision by the District Court and review by the Court of Appeals, this unique statute has the three-judge appellate panel determine the existence of a prima facie case as the first step. See § 2244(b)(3)(A)-(C). In nearly all cases, this is intended to be the *only* decision on whether the petitioner may file his successive petition.[6]

Subdivision (3)(E) precludes petitions for rehearing or certiorari. " '[I]t would be a strange rule . . . which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition . . . .' " *Carlisle* v. *United States*, 517 U. S. 416, 422 (1996) (quoting *United States* v. *Smith*, 331 U. S. 469, 474 (1947)). Normally, a statute or rule limiting when a motion for an action can be made also limits the authority of the court to take that action. That is how this Court understood this provision in *Felker*. "Section 2244(b)(3)(E) *prevents* this Court from reviewing a court of appeals order denying leave to file a second habeas petition by appeal or writ of certiorari." 518 U. S., at 658-659 (emphasis added).

Rehearing en banc is arguably distinguishable from certiorari and panel rehearing in that, in 1996, litigants could not "petition" for it but only "suggest" it. See *Missouri* v.

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6. The Court of Appeals' decision that the petitioner has made a prima facie case that he can meet the criteria does not establish that he has actually met them. That issue is determined by the District Court and subject to review in the usual course of proceedings. See § 2244(b)(4).

Jenkins, 495 U. S. 33, 46, n. 14 (1990).[7] However, the elimination of en banc review does not rest on paragraph (3)(E) alone, but primarily on paragraph (3)(B). See Part III-A, *supra*, at 13-16.

Understood in this way, the congressional design is clear and consistent. The gatekeeping mechanism decides whether there will or will not be another round of federal habeas litigation. To preclude that decision from routinely spawning its own multi-round litigation, it is assigned directly to a three-judge panel, and all the routine mechanisms of review are prohibited. Only the extraordinary measures of mandamus, prohibition, and original habeas in this Court remain.

In the *Harris* case, the three-judge panel had decided against Harris both on his fourth federal habeas petition, *Harris* v. *Vasquez*, 961 F. 3d 1450 (CA9 1992), and on his attempt to evade *McCleskey* through a civil rights action. See *Gomez* v. *United States District Court*, 1992 U. S. App. LEXIS 7931 (CA9, Apr. 20, 1992), withdrawn and dismissed as moot, 966 F. 2d 463 (CA9 1992). The stays vacated by this Court in *Gomez* were for the purpose of allowing reconsideration of these decisions en banc. To construe subdivision (b)(3) as allowing reconsideration en banc while forbidding all the other normal modes of review, one would have to attribute to Congress an intent to leave intact the very form of review so badly abused in the case overwhelmingly cited as the exemplar of abuse.

Both the clear text of the statute and the unambiguous intent to prevent cases like *Harris* are contrary to such an interpretation. The statute requires the motion to be *determined* by the three-judge panel, period. The general authority to rehear en banc is withdrawn from this particular proceeding.

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7. This distinction was eliminated in the 1998 amendments. See Committee Notes on 1998 Amendments to Fed. Rule App. Proc. 35(b), 28 U. S. C. App., p. 626.

CONCLUSION

The petition for writ of certiorari should be granted, or, in the alternative, the Court should set the case for argument on whether an extraordinary writ should issue.

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Respectfully submitted,

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